



M'Irithia v M'Kithiano; M'Raji (Applying as the Administrator of the Estate of M'Raiji M'Kithiano) (Applicant) (Environment & Land Case 148 of 1995) [2022] KEELC 2455 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 148 OF 1995**

CK NZILI, J

JULY 20, 2022

BETWEEN

ELIZABETH KAMWITU M'IRITHIA PLAINTIFF

AND

M'RAIJI M'KITHIANO DEFENDANT

AND

STANLEY MUREGA M'RAJI (APPLYING AS THE ADMINISTRATOR OF THE ESTATE OF M'RAIJI M'KITHIANO) APPLICANT

RULING

1. Through an application dated December 21, 2020 the court is asked to appoint the applicant in the place of the defendant, the late M'Raiji M'Kithiano lifting or removing an order of inhibition placed against L.R No. Ntima/Igoki/146 on 2.8.1995.
2. The application is supported by an affidavit sworn on the even date by Stanley Murega. The grounds given are that efforts to trace the original file no. 148 of 1995 Elizabeth Kamwilu vs M'Raiji M'Kithiano have been in vain; the applicant is one of the administrators of the deceased estate who was the defendant in suit; the deceased passed on September 2, 1998 and no substitution was done hence the suit abated. That in the said file an inhibition order had been issued against the property but the plaintiff has taken advantage of it; there is likelihood that the said file was closed and disposed off; the property encumbered forms part of the estate of the decision in High Court Succession Cause No. 419 of 2006 which has been determined. That no registration can be done with the inhibition order in place and the land registrar has refused to effect any registration until the inhibition is lifted.
3. The applicant has attached copies of the letters of administration, death certificate, confirmed grant, search certificate, the order, court register and an order for the opening of a skeleton file.



4. The application is opposed through a replying affidavit sworn by Elizabeth Kamwitu M'Itirithia on March 9, 2022. The reasons given are that the suit in 1995 was on account of customary trust and that she has lived on the suit land since 1963 to date alongside her relatives which facts were laid out during the succession cause and the probate court ordered the properties to be shared equally. That the net effect of the succession cause was she and her family would be evicted despite extensive developments thereon as per the attached photographs. That she has no other home and would stand prejudiced if the land which is only one acre is divided into ten portions. That the applicants are merely intending to dispose of the land and not to settle therein. That she has filed an appeal against the probate court's decision hence needs a chance to ventilate her appeal.
5. In a supplementary affidavit sworn on March 22, 2022 the applicant maintains that the suit herein has abated hence the inhibition serves no purpose; that the period for filing an appeal in the succession cause expired hence the notice of appeal was invalid and, in any event, the two suits are different.
6. Lastly the inhibition order was unnecessary and oppressive to the applicants. The applicant relies on the submissions dated 26.4.2022.
7. Order 24 *Civil Procedure Rules* requires an application be made within one year otherwise the suit abates. However, there is a proviso that the court may for good reason extend the time to apply for the substitution of a party who has passed on.
8. When a legal representative is not joined within a year and the suit abates an application for extension of time to apply for joinder of the deceased legal representative has to be made. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.
9. While construing this order the Court of Appeal in *Rebecca Mijine Mungole & another vs Kenya Power & Lighting Co. Ltd and 2 others* (2017) eKLR held order 24 Civil Procedure Rules must be construed by reading as a whole and the sequence in which it is framed must be followed without short circuiting it. That the proviso to rule 3 (2) to the effect that the court may for good reason on an application extend time goes to show that without time being extended, no application for the revival or joinder can be made.
10. The court held it is the effluxion of time that causes the suit to abate and that it is that time that must be first extended and once extended, only then can the legal representative bring an application to be joined in the proceedings. Further the court held only after the legal representative has been joined as a party that he can apply for the revival of the action.
11. The court went on to state there was nothing objectionable in making an omnibus application for all the three prayers but it was incompetent to seek joinder or revival of the suit when the prayer for more time to apply had been granted.
12. Additionally, the court held once time has been extended and a legal representative joined the focus and burden shifts to him to show cause why the abated suit should be revived by giving sufficient cause why the court should allow for the revival.
13. Applying the above reasoning, the applicant herein has made the prayers for joinder, revival of the suit and the lifting of the inhibition only. There is no prayer for extension of time to allow for the two prayers since the application is being made 13 years since the suit abated.
14. There is no good explanation why the applicant while aware of the procedure has sought for the two prayers without invoking the principal prayer(s) as required by the law.



15. An abated suit is a non-existent suit. The suit herein abated against the non-existent defendant. Once it abated whatever orders in existence went with the abatement and became invalid in law from the date of abatement.
16. The plaintiff did not pursue the suit and has offered no explanation why she did not seek to revive the suit within one year. Strangely and while the intended defendant is seeking to come to her rescue and breathe life to the suit she is totally opposed to the same.
17. In *Wallace Kinuthia vs Anthony Ndun'gu Muongi and 3 others* (2013) eKLR the court cited with approval *Kenya Farmers Cooperative Union Ltd vs Charles Murgor (deceased) trading as Kaptabei Coffee Estate* (2005) eKLR and held it had no jurisdiction to hear and determine a suit which had abated by operation of law until its revival as provided by law; otherwise it would be an exercise of futility.
18. Coming to the inhibition order said to exist against L.R No Ntima/146, the copy of search attached shows the order was to subsist until the suit was finalized. Section 70 of the *Land Registration Act* 2012 provides that an inhibition subsists until an occurrence of an event or until further orders of the court.
19. The occurrence of the event happened after the suit abated when the plaintiff failed to enjoin the legal representative. To date no such application has been made to bring on board the legal representative outside time and for the revive the abated suit.
20. In *James Mugo Manyara vs Phares Mungathia* (2020) eKLR citing with approval *Mboya Nzulwa vs KPLC Co. Ltd* (2018) eKLR the court held an abated suit is a non-existent suit.
21. In *Bushasha Lucheri vs Joseph Langata Sitienei & another* (2012) eKLR the court took the view that once a suit abates it is as good as a dismissed suit and hence any orders granted therein are automatically vacated and are deemed as having been so vacated.
22. Applying the above reasoning and guided by the overriding objective of this court to do substantive justice under Section 1A, 1B and 3A of the *Civil Procedure Act*, I find the suit herein non-existent. It is hereby marked as abated. Any orders issued thereon have become non-existent and vacated by operation of law. There will be no order as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20TH DAY OF JULY, 2022**

In presence of:

Ntarangwi for applicant

HON. C.K. NZILI

ELC JUDGE

